DOCUMENT RESUME

ED 268 647 EA 018 367

TITLE	Procurement: National Institute of Education's Procurement Practices. Report to the Chairman, Subcommittee on Intergovernmental Relations and Human Resources, Committee on Government Operations, House of Representatives.
INSTITUTION	General Accounting Office, Washington, D.C. Div. of Human Resources.
REPORT NO	GAO/HRD-86-1
PUB DATE	Jan 86
NOTE	34p.
AVAILABLE FROM	Publication Sales, U.S. General Accounting Office, P.O. Box 6015, Gaithersburg, MD 20877 (first 5 copies, free; additional copies $2.00 each, prepaid--check or money order made out to Superintendent of Documents; discounts available on large quantity orders).
PUB TYPE	Reports - Evaluative/Feasibility (142)
EDRS PRICE	MF01/PC02 Plus Postage.
DESCRIPTORS	Educational Finance; *Educational Policy; Elementary Secondary Education; Eligibility; *Federal Aid; *Federal Programs; Financial Policy; *Grants; Money Management; *Politics of Education
IDENTIFIERS	General Accounting Office; *National Institute of Education

ABSTRACT

This document comprises the General Accounting Office's (GAO) report to the House Subcommittee on Intergovernmental Relations concerning the GAO's review of the contract awarding process of the National Institute of Education (NIE) for fiscal year 1983. The review focused on 39 of NIE's 52 newly negotiated procurement contracts; a sample of purchase orders for commissioned papers on topical education problems and issues were also reviewed. This report is presented in the form of summary responses to six specific questions from the subcommittee regarding NIE's procurement activities. The questions concern (1) how often NIE has revealed the number of proposals received, prices, cost ranges, or government cost estimates to bidders; (2) how often NIE has awarded contracts to other than lowest-priced bidders; (3) how often the Director of NIE has made the award decision; (4) what percentage of NIE contracts were awarded competitively; (5) how many contracts NIE awarded at the end of the fiscal year; and (6) how many Department of Education personnel have been employed by NIE contractors. A lengthy appendix assesses NIE's contract award processes in detail, covering (1) its scope and methodology; (2) competitive contract awards, with specific attention to requests for proposals (RFPs), awards to other than lowest offeror, and contract awards decided by NIE Director; (3) four noncompetitive contract awards deemed unjustifiable; (4) contracts awarded at year-end; and (5) employment relationships between Education Department employees and NIE contractors. (TE)

EA

United States General Accounting Office

GAO

Report to the Chairman, Subcommittee on Intergovernmental Relations and Human Resources, Committee on Government Operations, House of Representatives

January 1986

PROCUREMENT

National Institute of Education's Procurement Practices

ED268647

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

EA 018 367

GAO

United States
General Accounting Office
Washington, D.C. 20548

Human Resources Division
B-220309

January 17, 1986

The Honorable Ted Weiss
Chairman, Subcommittee on
Intergovernmental Relations
and Human Resources
Committee on Government Operations
House of Representatives

Dear Mr. Chairman:

In response to your letter of February 13, 1984, and subsequent meetings with your staff, we reviewed the contract award process of the National Institute of Education (NIE), a part of the Department of Education's Office of Educational Research and Improvement.[1] NIE awards contracts and grants to support research on problems faced by educational institutions, teachers, and students, and disseminates research results to advance the practice of education.

Our review focused on NIE contracting activities for fiscal year 1983, during which the agency awarded 52 new negotiated contracts, obligating about $22.5 million for them. We reviewed 39 of these procurements, including competitively and noncompetitively awarded contracts. In addition, we reviewed a sample of purchase orders (awards under $10,000) for commissioned papers on topical education problems and issues. NIE records indicated that it issued 79 such orders totaling about $237,000, but we noted that not all were for commissioned papers. Adjusting for this error, we estimated that NIE awarded 72 purchase orders instead of 79 in fiscal year 1983.

Your specific questions regarding NIE's procurement activities and our summary responses are presented below. More detailed information relating to each question and the scope and methodology of our work is provided in appendix I.

1. How often has NIE revealed the number of proposals received, prices, cost ranges, or government cost estimates to bidders who respond to advertised requests for proposals?

[1]Under a reorganization of the Office of Educational Research and Improvement, approved October 1, 1985, NIE's functions were reassigned to various programs within the Office. All contracting functions for the Office will be handled by the Department's Grants and Contracts Service in its Office of Management.

We reviewed files for a sample of 21 of the 33 negotiated contracts that NIE awarded through competitive requests for proposals. (One such contract was excluded from the scope of our review because it was being protested by the unsuccessful offeror when we began our work.) In our interviews of contracting officials and review of documentation contained in the negotiated competitive contract files, we found no evidence that the number of proposals received, prices, cost ranges, or government cost estimates were disclosed during the evaluation process to any offeror that responded to the requests for proposals.

But for two 1983 contracts that NIE competitively awarded and were protested to our office by unsuccessful offerors, our review showed that the protests were based in part on NIE's disclosure of the government's cost estimate during the proposal evaluation period. (The General Accounting Office reviews and issues decisions on protests filed by interested parties who allege violations of statutory or regulatory provisions governing the award of formally advertised or negotiated contracts.) The two protested cases were resolved as follows:

In one case, NIE revealed the government's cost estimate during the evaluation process to encourage the eventual awardee to lower its costs. The Comptroller General ruled (Bank Street College of Education, 63 Comp. Gen. 393 (1984), 84-1 CPD 607) that the unsuccessful protesting offeror did not receive unequal treatment because its proposed cost was below the government estimate; therefore, discussions were not necessary to cure any overpricing deficiency in its proposal.

In the other case, NIE told two offerors the percentages by which their cost proposals exceeded the government estimate, but the percentages were erroneous. Because the error in the percentage provided the protester was greater than that provided the awardee, the Comptroller General sustained this protest (Northwest Regional Educational Laboratory, B-213464, Mar. 27, 1984, 84-1, CPD 357). NIE explained, however, that the work under the contract was a priority and was substantially underway. Therefore, the Comptroller General did not recommend that the offerors be given another opportunity to submit new proposals, and the contract was continued with the awardee. (See p. 17.)

2. How often has NIE awarded contracts to other than the lowest-priced bidders, and were these awards properly justified according to regulations?

In examining our sample of 21 competitively awarded contracts, we found that NIE awarded 5 negotiated cost-reimbursement contracts to other than the lowest offerors. The requests for proposals for these five contracts stated that technical quality would be given greater priority than cost in awarding the contracts, and according to the contract files, factors other than price were the primary considerations in making these awards. Projecting our findings to the universe of NIE's fiscal year 1983 competitively awarded contracts, we estimate that this occurred for 11 awards. However, award of these contracts to other than the lowest offerors was not inconsistent with federal procurement regulations. Such regulations do not require negotiated contracts to be awarded to the lowest-cost offeror, but specify that the primary consideration in such awards be a determination of which contractor can perform in a manner most advantageous to the government. (See p. 18.)

3. How often has the Director of NIE acted as a contracting officer (made the award decision); what reasons precluded the actions of a regular contracting officer; and were the reasons justified according to regulations?

In fiscal year 1983, the NIE Director made a decision to award nine contracts to plan a new educational laboratory in the central Midwest region. NIE had not renewed a prior contract with a laboratory in that region because of the contractor's failure to demonstrate a satisfactory record of integrity and business ethics. The laboratory protested the decision not to renew its contract and, according to NIE's contract specialist for these awards, the NIE Director became involved in the award decision because of its sensitivity. The Director has legal authority to enter into contracts to carry out NIE's functions, and discretion to exercise that authority whenever the Director thinks it will further NIE's statutory objectives.

NIE planned to award several planning contracts and received 10 proposals in response to its request for proposals. An NIE project review board, consisting of a chairman and three other members, was established to review the technical proposals. The board's initial technical evaluation report, dated September 21, 1983, noted that one proposal was "nonresponsive" and recommended that, of the remaining nine, four be classified technically acceptable and five, technically unacceptable. According to the board members, the recommendations relative to the remaining nine proposals were based on the assumption that sufficient funds were not available to fund all nine.

But when the board chairman discussed the report with the Director, he was advised that funds were available to award contracts to all nine offerors who submitted proposals that met the requirements of the request for proposals. A second report from the board chairman dated September 22, 1983, reclassified the four acceptable proposals as especially strong and no longer referred to the other five as unacceptable, but noted that they contained a mixture of strengths and weaknesses. Because the purpose of the procurement was to stimulate strong participation in planning for the new laboratory and the NIE Director was advised that the proposals were not considered greatly dissimilar, it was recommended that contracts be awarded to all nine offerors. Based on this recommendation, the NIE Director approved award of the nine contracts on September 23, 1983. (See p. 19.)

4. What percentage of NIE contracts are awarded on a competitive basis, and were noncompetitive contract awards justified according to regulations?

In fiscal year 1983, NIE awarded 52 new contracts; 38 (73 percent) were competitively awarded, and 14 (27 percent) noncompetitively awarded. The competitive contract awards included 34 negotiated contracts awarded through competitive requests for proposals and 4 competitive awards to small business firms. Competitive contracts totaled about $5,644,000 and represented 25 percent of the $22.5 million obligated for fiscal year 1983 contract awards; noncompetitive awards valued at about $16,820,000 represented 75 percent of the total. Of the 14 noncompetitive awards, 8 to educational laboratories and a research center were mandated by law. These eight were valued at about $16.1 million and represented 96 percent of the obligations for such awards. The remaining six, valued at about $720,000, or 4 percent of the obligations for noncompetitive contracts, were awarded at NIE's discretion. In our opinion, four of these six noncompetitive contract awards were not properly justified according to regulations.

Also, of NIE's 72 purchase orders for preparation of papers on education issues, an estimated 69 (96 percent) were awarded contrary to the intent of procurement regulations. (See p. 21.)

5. How many contracts did NIE award at the end of the fiscal year?

During fiscal year 1983, NIE awarded 52 new contracts and obligated about $22.5 million for them. One contract was excluded from the scope of our review because it was being protested by an unsuccessful offeror

when our work began. Obligations for the remaining 51 contracts totaled about $21.8 million. We reviewed 39 of these contracts amounting to about $19.3 million. Of the 39 contracts, 21 totaling about $1.5 million, were awarded in the last week of the fiscal year. Projecting this finding to the universe, we estimated that 26 (51 percent) of the 51 fiscal year 1983 contracts were awarded in the last week of the fiscal year, 11 without adequate or any negotiations. For seven, some deliberative, orderly contracting processes were eliminated or performed in a perfunctory manner so that contracts could be awarded on or before September 30, 1983. One contract was awarded before all contract provisions were agreed upon by NIE and the contractor; another was awarded without designation of a project director; and five went to offerors whose proposals contained limitations that, according to the project review board, could have affected the successful outcome of the project. (See p. 30.)

6. Have any Department of Education personnel been employed by NIE contractors, either before or after the award of a given contract, and if so, describe the circumstances.

We identified 175 Education employees who were involved in the procurements we examined. Except for one, we did not identify any employees who worked for the specific contractor they were involved with, either before or after the contract award. In the one instance, an NIE employee participated in developing a request for proposals and subsequently left NIE to become the project director for the contractor selected. The Department of Education's ethics counselor determined that in this case no applicable laws or regulations were violated. (See p. 32.)

Since fiscal year 1983, the period covered by our review, the Congress has enacted the Competition in Contracting Act of 1984 (title VII of division B of Public Law 98-369), which requires executive agencies to obtain full and open competition in procuring property or services. The act identifies circumstances under which noncompetitive procedures may be used and requires justifications in writing and approvals by designated management officials (the level of approval dependent on contract amount). Federal regulations were amended to incorporate the act's competition provisions.

Also, NIE has drafted an Acquisition Policies and Procedures Handbook, which establishes uniform policies and procedures for NIE procurements.

According to the NIE official responsible for preparing the handbook, it will be revised to incorporate the act's requirements. As of October 17, 1985, the revisions had not been completed. When issued, the handbook should help NIE to better comply with the act's provisions for noncompetitive procurements. Therefore, we are making no recommendations at this time to the Secretary of Education.

As you requested, we did not obtain written comments from the Department of Education on a draft of this report. The Department, however, was given an opportunity to review the draft and to provide oral comments. The Department generally agreed with the information contained in the report, and its comments were considered in preparing this report.

As arranged with your office, unless you publicly announce its contents earlier, no further distribution of this report will be made until 30 days from its issue date. At that time, we will send copies of the report to interested parties and make copies available to others upon request.

Sincerely yours,

Richard L. Fogel
Director

Contents

Letter Report 1

Appendix

Appendix I: National Institute of Education's Procurement Practices 10

Abbreviations

GAO	General Accounting Office
NIE	National Institute of Education
RFP	request for proposals
SBA	Small Business Administration
SBIR	Small Business Innovation Research

National Institute of Education's Procurement Practices

In response to a February 13, 1984, request from the Chairman of the Subcommittee on Intergovernmental Relations and Human Resources, House Committee on Government Operations, we reviewed the contract award process of the National Institute of Education (NIE). Our review was directed primarily toward responding to the following questions asked by the Chairman:

1. How often has NIE revealed the number of proposals received, prices, cost ranges, or government cost estimates to bidders who respond to advertised requests for proposals?

2. How often has NIE awarded contracts to other than the lowest-priced bidders, and were these awards properly justified according to regulations?

3. How often has the Director of NIE acted as a contracting officer (made the award decision); what reasons precluded the actions of a regular contracting officer; and were the reasons justified according to regulations?

4. What percentage of NIE contracts are awarded on a competitive basis, and were noncompetitive contract awards justified according to regulations?

5. How many contracts did NIE award at the end of the fiscal year?

6. Have any Department of Education personnel been employed by NIE contractors, either before or after the award of a given contract, and if so, describe the circumstances.

Details of our findings on questions 1, 2, and 3 appear on pages 16-21; on question 4 on pages 21-30; on question 5 on pages 30-32; and on question 6 on pages 32-34.

Background

NIE, which is part of the Department of Education's Office of Educational Research and Improvement,[1] was created to advance the practice of education as an art, a science, and a profession; to strengthen the

[1]Under a reorganization of the Office of Educational Research and Improvement, approved October 1, 1985, NIE's functions were reassigned to various programs within the Office. All contracting functions for the Office will be handled by the Department's Grants and Contracts Service in its Office of Management.

scientific and technological foundations of education; and to build an effective research and development system.

To accomplish its goals of improving the quality of education, NIE supports, through contracts and grants, research on problems faced by educational institutions, teachers, and students, and disseminates the research results. These activities are accomplished in part through educational laboratories and national research centers operated under NIE contracts and grants. The laboratories identify and support specific regional educational research and developmental needs; the research centers conduct research in areas or topics of national concern and disseminate the results nationally. During fiscal year 1983, NIE awarded contracts to seven educational laboratories and one research center.

NIE's Contract Award Processes

Federal regulations in effect at the time the contracts we reviewed were awarded required agencies to award all contracts competitively to the maximum practicable extent.[2] The two basic methods by which the government procures supplies and services are sealed bidding and negotiation. For fiscal year 1983, NIE was authorized to negotiate contract awards for experimental, developmental, or research work because this type of work could not be described by definite drawings or specifications and only the ultimate objectives and general scope could be outlined.

Usually, competitive contract awards are based on proposals submitted in response to requests for proposals (RFPs) (synopsized in the Commerce Business Daily) according to Department of Education procurement regulations[3] that apply to NIE. An NIE project review board, consisting of a chairman and at least two other members, is established to review the technical proposals submitted in response to the RFP. The contracting officer evaluates the costs of the proposal. After NIE evaluates the proposals, a competitive range, consisting of offerors with a reasonable chance for award, is established.

[2]Federal government procurements are now regulated by the Federal Acquisition Regulation system, effective April 1, 1984. The system is essentially a consolidation of two primary procurement regulations: the Defense Acquisition Regulation, covering defense agencies, and the Federal Procurement Regulations, covering most other agencies. Subsequently, the regulations were changed to implement the Competition in Contracting Act of 1984, which enhances competition, and apply to all solicitations issued after March 31, 1985.

[3]At the time the contracts we reviewed were awarded, these regulations supplemented the Federal Procurement Regulations then in effect.

Written or oral discussions are conducted with offerors in the competitive range concerning the work to be performed, the cost, and any uncertainties or deficiencies in an offeror's proposal. After discussions are concluded, the contract award is to be made to the offeror whose proposal is the most advantageous to the government, considering price and such other factors as the technical quality of the proposal.

Noncompetitive contract awards, according to Department of Education regulations at the time of our review, could be used only when justified by compelling and convincing reasons or circumstances. Justifications for a noncompetitive contract had to be approved before a sole-source RFP or a solicitation letter was issued. Noncompetitive procurements valued up to $100,000 had to be approved by either the contracting officer or the chief of the procurement office, the approval level depending on the dollar amount. An NIE Noncompetitive Procurement Review Board had to approve noncompetitive procurements of $100,000 or more. This board, with two permanent and two rotating members, reviewed and approved the justifications for noncompetitive procurements.

Between 1979 and 1983, there were several legislative and administrative changes that affected NIE contracting processes, especially with respect to its educational laboratories and research center.

On January 15, 1979, NIE had issued an administrative policy indicating its intention, subject to stated qualifications, to enter into long-term agreements with the laboratories and center, providing for NIE support for a 5-year period. In accordance with that policy, NIE awarded to each of eight laboratories and one center a 3-year contract covering the period December 1, 1979, to November 30, 1982. The policy also called for NIE to conduct a rigorous on-site review near the end of the third year of a contract. Future NIE funding would depend on review results.

But a change in policy resulted from enactment of the Omnibus Budget Reconciliation Act of 1981 (95 Stat. 357, Aug. 13, 1981). Upon completion of existing contracts, future funding of laboratories and centers was to be in accordance with government-wide competitive bidding procedures and principles of peer review by scholars and state and local educators, according to the conference report[4] on the act. This was intended to ensure the quality and relevance of proposed work.

[4]H.R. Rep. No. 208, 97th Cong., 1st Sess. (1981), pp. 729-730.

On March 19, 1982, NIE advised the laboratories and center that, when the 3-year contracts expired on November 30, they should phase out their noncompetitive activities in preparation for open competitions for new contract awards. Of the 17 laboratories and centers that received fiscal year 1980 contracts and grants, 11 protested to NIE that, under the 1979 agreements, they were entitled to at least 5 years of support. It would be a breach of contract, they claimed, to phase them out earlier.

Further, NIE was not allowed to terminate any long-term special institutional agreements with the laboratories and centers for the full 5 years, according to the Urgent Supplemental Appropriations Act of 1982 (96 Stat. 180, July 18, 1982). The related Senate report[5] said that, at the end of the 5-year period, NIE should competitively award contracts and grants to laboratories and centers. On July 28, 1982, NIE informed the laboratories and center that it would delay competition until 1985. It then extended contracts to seven of the laboratories and the center for a 2-year period beginning December 1, 1982. (NIE decided not to renew its contract with one laboratory because of its failure to demonstrate a satisfactory record of integrity and business ethics.)

(According to the Chief, Contracts and Grants Management Division, NIE extended these contracts for an additional year beginning December 1, 1984. In July and August 1985, NIE competitively awarded contracts to eight laboratories for 5-year periods beginning December 1, 1985, and was in the process of competitively awarding 5-year grants to 11 centers.)

Additionally, in fiscal year 1983, the Department of Education and certain other agencies had to reserve a percentage of their research and development budgets for contracts with small business concerns. This was required by Public Law 97-219, which established the Small Business Innovation Research (SBIR) program. The requirement was intended to encourage use of small businesses to meet federal research and development needs. Also, agencies could award contracts to the Small Business Administration (SBA) on behalf of small minority businesses. Section 8(a) of the Small Business Act (15 U.S.C. 637(a)) authorized this to increase participation by minority small businesses in government procurements.

[5]S. Rep. 97-402, 97th Cong., 2d Sess. (1982).

Scope and Methodology

To assess NIE's contracting process, we first reviewed its records on all contracts and purchase orders awarded during fiscal year 1983 (NIE's fiscal year 1984 contracting activities were not yet completed at the time we began our review). NIE data showed these awards to consist of

- 52 new negotiated contract awards obligating about $22.5 million (38 or 73 percent awarded competitively and 14 or 27 percent noncompetitively, including 8 that were legislatively mandated to go to educational laboratories or a research center);
- modifications to 33 contracts awarded in prior fiscal years, increasing their costs by $9.7 million; and
- 84 purchases using purchase orders (awards under $10,000), 79 of these for commissioned papers on topical education problems and issues, costing about $237,000.

As agreed with the Subcommittee, we excluded from our review 1 of the 52 new contracts, valued at about $700,000 (it was being protested to our office[6] by an unsuccessful offeror[7]), and the 33 contract modifications. We also excluded purchase orders for other than commissioned papers and adjusted the number of purchase orders for commissioned papers to account for errors in the data (see p. 15). Accordingly, our review focused on the universe of 51 new contract awards and an estimated 72 purchases for commissioned papers.

We based our assessment of NIE's contract award process on federal and Department of Education procurement regulations, and NIE policies, procedures, and guidelines in effect at the time of the awards. To ascertain NIE's compliance with these regulations and guidelines, we reviewed contract files for a sample of 39 contracts awarded in fiscal year 1983, as well as 23 purchase orders and other pertinent records.

In addition, we interviewed NIE contracting and program office personnel, where appropriate, and reviewed bid protest decisions involving unsuccessful offerors who filed protests with our office concerning three contract award decisions.

We reviewed the contract award process beginning with the issuance of a solicitation document and ending with the signing of the contract.

[6]The General Accounting Office reviews and issues decisions on protests filed by interested parties alleging violations of statutory and regulatory provisions governing the award of government contracts.

[7]See Bank Street College of Education, 63 Comp. Gen. 393 (1984), 84-1 CPD 607.

Also, however, we reviewed modifications made to the sampled contracts.

The universe of 51 new NIE contracts for fiscal year 1983 included

- 33 competitive contracts totaling $4.6 million awarded through the issuance of RFPs,
- 5 noncompetitive contracts totaling about $640,000 awarded on a sole-source basis,
- 1 noncompetitive contract for about $80,000 awarded in response to an unsolicited proposal,
- 2 contracts totaling about $76,000 competitively awarded to small business firms under the SBIR program,
- 2 contracts totaling about $268,000 competitively awarded to small business firms under the SBA 8(a) program, and
- 8 noncompetitive continuation contracts totaling about $16.1 million awarded to 7 established educational laboratories and 1 center.

Our sample of 39 of the 51 new contracts, representing NIE's fiscal year 1983 contract activities, was designed to provide estimates at the 95-percent level of confidence with a maximum sampling error of 13 percent or 4 contracts.

Of the 33 new contracts that NIE awarded through competitive RFPs, we reviewed a sample of 21, as well as all 4 contracts competitively awarded to small business firms. We did not, as noted earlier, review one competitively awarded contract that was being protested at the time of our review. Our sample was stratified on the basis of fiscal year 1983 funds obligated for each contract. We randomly selected 5 of the 12 contracts over $200,000 and 3 of the 8 contracts between $100,000 and $200,000. Because 9 of the 13 contracts under $100,000 were awarded on the basis of one RFP for the same planning project, we reviewed all 13. Since the universes for the other 18 awards—SBIR, SBA 8(a), sole-source, unsolicited proposal, and laboratory and center contracts—were too small for sampling, we reviewed all of them.

Concerning purchase orders for commissioned papers, although NIE records showed that it awarded 79, we found errors in these data. Initially, we selected for review 28 purchase orders—4 for amounts over $5,000 (because an NIE directive on commissioned papers stated that their cost should not exceed $5,000) and 24 randomly. But the 4 over $5,000 were inaccurately reported as commissioned papers; this reduced the universe to 75. Also, 1 of the 24 randomly sampled purchase orders

was inaccurately reported. Accordingly, we projected this error over the remaining universe of 75 and estimated that NIE awarded 72 instead of 79 purchase orders for commissioned papers. We then reviewed the remaining 23 randomly selected purchase orders, which were for commissioned papers.

Based on our projections, we estimated that NIE awarded 69 (96 percent) of the estimated 72 purchase orders for commissioned papers without competition.

To determine whether any Education personnel had been employed, before or after the award of a given contract, by the NIE contractors with whom they were involved while at Education, we identified all Education personnel associated with the contract and purchase order awards we reviewed. We examined their employment histories, where available; for employees who had left Education, we attempted to determine where they worked subsequently.

Our work was performed in accordance with generally accepted government auditing standards.

Competitive Contract Awards

With regard to competitive contract awards, the Subcommittee was concerned about three matters. Its questions and our findings in brief were:

1. Did NIE reveal government estimates and certain other data to respondents to NIE RFPs? Except for two protested awards, we found no evidence relative to the 21 competitively awarded contracts we sampled that NIE revealed prohibited data to offerors.

2. How many contracts were awarded to other than the lowest offeror? Of the 21 competitively awarded contracts we reviewed, 5 were awarded to other than the lowest offeror; but in accordance with the source selection criteria stated in the RFP, factors other than cost were the primary considerations. Projecting these findings to the universe of NIE's fiscal year 1983 contract awards, we estimate that this occurred for 11 competitively awarded contracts.

3. How often was the NIE Director involved in contract award decisions? NIE's Director, who has ultimate authority for contract awards, made a decision that affected the award of nine of the contracts we reviewed.

More details on these matters appear below.

For Competitive RFPs, Proposals Held Confidential

According to Department of Education regulations, it is essential to the competitive procurement process that all information contained in offerors' proposals be maintained in strict confidence. During the proposal evaluation period, under the regulations, the number of proposals received, prices, cost ranges, and government cost estimates should not be disclosed to any offeror.

Our review of NIE files for the 21 negotiated contracts awarded through competitive RFPs and our interviews with NIE contracting officials revealed no evidence that any of this confidential information was disclosed during the evaluation process to any offeror who responded to an RFP.

But in addition to these 21 awards, we also reviewed two 1983 competitively awarded NIE contracts that were protested to our office by unsuccessful offerors. Our examination showed that the protests were based, in part, on NIE's disclosure of the government's cost estimate during the proposal evaluation period. (Of these two contracts, one was excluded from our sample universe because it was being protested by the unsuccessful offeror when we began our review; the other because of the random nature of our sample.) Concerning these protested contracts, we found the following:

Case 1. NIE revealed the government's cost estimate during the evaluation process to the eventual awardee but not to the unsuccessful offeror. The Comptroller General decided[8] that, since the purpose of providing this information was to encourage an offeror to lower its costs, the unsuccessful offeror did not receive unequal treatment; its proposed cost was below the government cost estimate, thus not considered deficient in terms of cost. An agency is not required to hold the same discussions with all offerors, as the types of deficiencies contained in each offeror's proposal vary. Therefore, it is not improper to reveal the agency's cost goal, so long as no offeror's competitive standing is divulged.

Case 2. During the negotiation process, NIE told each of the two competing offerors the percentage by which their cost proposals exceeded the government cost estimate, but the percentages were erroneous. The successful offeror was told its cost proposal was 10 to 12 percent higher than the government cost estimate; the correct percentage was 13. The

[8]See Bank Street College of Education, 63 Comp. Gen. 393 (1984), 84-1 CPD 607.

protester was told its proposal was 29 to 31 percent higher, but the correct percentage was 43. Consequently, NIE evidently caused the protester to submit a significantly higher revised cost proposal than it otherwise would have. The Comptroller General sustained the protest,[9] concluding that, since NIE's error was greater for one offeror than the other, the protester was prevented from competing on an equal basis with the awardee. NIE explained, however, that the work under the contract was a priority and was substantially underway. Therefore, the Comptroller General did not recommend that the offerors be given another opportunity to submit new proposals, and the contract was continued with the awardee.

Awards to Other Than Lowest Offeror

From our review of a sample of NIE's contract files, we found that in fiscal year 1983 NIE awarded five contracts to other than the lowest offeror.[10] The RFPs for these five contracts stated that technical quality would be given greater priority than cost in awarding the contracts, and, according to the files, factors other than price were the primary consideration in making these awards.

Of the 51 negotiated contracts awarded in fiscal year 1983, we estimate that 34 did not involve price competition among competing offerors because either (1) only one offeror responded to the RFP, (2) multiple awards were made to all technically acceptable offerors to an RFP, or (3) the procurement involved a sole source, unsolicited proposal, small business, or contract renewal with a laboratory or center. Of the remaining 17 contracts that involved more than one competitive offeror, we estimate that 11 were awarded to other than the lowest-priced offerors. Thus, in our estimation, 6 of the 17 contracts were awarded to the lowest-priced offerors.

Department of Education procurement regulations provide that negotiated contracts be awarded to the offeror whose proposal offers the greatest advantage to the government, price and other factors considered. Similarly, federal procurement regulations state:

"There is no requirement that cost-reimbursement type contracts be awarded on the basis of either: (a) The lowest proposed cost, (b) the lowest

[9]See Northwest Regional Educational Laboratory, B-213464, March 27, 1984, 84-1 CPD 357.

[10]In addition, one other fiscal year 1983 contract award, which was not included in our review because it was being protested by the unsuccessful offeror when we began our review, was also awarded to other than the lowest offeror.

proposed fee, or (c) the lowest total estimated cost plus proposed fee. The award of cost-reimbursement type contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns. The cost estimate is important to determine the prospective contractor's understanding of the project and ability to organize and perform the contract. The agreed fee must be within the limits prescribed by law and appropriate to the work to be performed. . . Beyond this, however, the primary consideration in determining to whom the award shall be made is which contractor can perform the contract in a manner most advantageous to the Government." (41 C.F.R. 1-3.805-2)

The values of the five contracts awarded to other than the lowest-priced offerors ranged from $90,833 to $621,386 each; the difference between the lowest offer and the awarded contract amount ranged from $25,879 to $190,366. According to documentation in the contract files, NIE based its award decisions on the technical quality of the proposals; in each case, the winning proposal received a higher technical evaluation score than the lowest-priced proposal.

Contract Awards Decided by NIE Director

By law (20 U.S.C. 1221 e(f)(1)), NIE's Director is authorized to enter into contracts to carry out NIE's functions. As NIE's ultimate contracting authority, the Director has the discretion to exercise that authority whenever the Director thinks it will further NIE's statutory objectives. A contracting officer's authority is derived from the general grant of contracting authority to the agency head.

In fiscal year 1983, the NIE Director decided to award nine planning contracts for a new educational laboratory.[11] NIE had elected not to renew its contract with an educational laboratory in the central Midwest because of that laboratory's failure to demonstrate a satisfactory record of integrity and business ethics. The laboratory protested the decision not to renew its contract and, according to NIE's contract specialist for these awards, the NIE Director became involved in the award decision because of its sensitivity.

On July 20, 1983, NIE issued an RFP stating that several awards would be made to develop concepts and strategies for a new educational laboratory in that region. Ten offerors submitted proposals, which were

[11]In addition, the Director also made the decision to award a contract that we eliminated from the scope of our review because the award was being protested when we began.

reviewed by an NIE project review board. In a September 21, 1983, memorandum to NIE's Contracts and Grants Management Division, the board noted that one proposal was "nonresponsive," four technically acceptable, and five technically unacceptable.

According to the board, the unacceptable proposals had limitations that included (1) a lack of evidence that offerors had had successful experience with multistate projects such as that covered by the RFP, (2) insufficient familiarity with the range of issues that needed to be confronted in establishing a new laboratory in the region, (3) an unclear framework for carrying out project tasks, and (4) insufficient evidence that the offerors could accomplish the kinds of collaboration necessary to do the project within the short time frame called for in the RFP. The board expressed the view that the limitations raised ". . . serious questions about the ability of the offerors to successfully meet the requirements for this project."

The next day, however, in a second memorandum dated September 22, 1983, from the chairman of the project review board to the Contracts and Grants Management Division, the nine proposals were no longer identified as acceptable or unacceptable. The four called acceptable in the first memorandum were termed "especially strong," and the other five were no longer identified as unacceptable, but instead were considered to contain a mixture of strengths and weaknesses. The second memorandum repeated the limitations cited in the earlier communication regarding the five proposals, however, and stated that the limitations could affect the successful outcome of the project.

We discussed the two memoranda with the chairman of the project review board, who said they were based on a single technical evaluation performed by the board. All four board members told us that recommendations in the September 21 memorandum were based on the assumption that sufficient funds were not available to fund all nine proposals meeting the RFP requirements.

After the proposals were reviewed, the chairman said, he discussed the board's evaluation results and recommendations with the NIE Director, who told him that enough funds had become available to award contracts to all nine offerors. The Director also questioned the board's finding of technical unacceptability for five of the proposals, since the board's scores for all nine proposals were similar. (The scores for the four offerors identified as acceptable ranged from 73.50 to 77.75; scores

for the other five, from 60.25 to 65.50.) Because more funds were available than previously thought and considering the closeness of the proposals' scores, the chairman said, the board reconsidered the issue and agreed with the Director's recommendation to award nine contracts.

We discussed the September 22 memorandum with each of the other three members of the project review board, who said the board did not reconvene to reconsider awarding contracts to all nine offerors. Two members said they were not contacted regarding the September 22 memorandum. Two members, however, said they agreed with the final decision to award contracts to all nine offerors, and one member did not object to the final decision.

On September 22, 1983, the NIE Director was offered two options for funding the planning project contracts. They were presented by NIE's Administrator of Educational Organizations and Institutions, who is responsible for coordinating NIE policies relating to the education laboratories and centers. One option was to fund the top four proposals, the other to fund all nine. The differences among the proposals were not that great, the Administrator advised the Director. Under usual procurement conditions, according to the Administrator, the negotiation process would give offerors the opportunity to clarify their proposals, but time constraints did not permit negotiations. As the purpose of the procurement was to stimulate strong participation with NIE in planning for the new laboratory, the Administrator recommended that all nine proposals be funded. Based on this recommendation, the NIE Director approved the award of contracts to all nine offerors on September 23, 1983.

Noncompetitive Contract Awards

Negotiated procurements were to be made on a competitive basis to the maximum practicable extent, according to federal procurement regulations in effect during fiscal year 1983. Department of Education regulations required all negotiated procurements to be made competitively unless there were convincing and compelling reasons justifying a noncompetitive contract. Of NIE's 52 new contracts in fiscal year 1983, 14 (27 percent) were awarded on a noncompetitive basis (sole source). Of those 14, 8 were legislatively mandated awards to educational laboratories and a research center. Awarded noncompetitively at NIE's discretion were the remaining six contracts, whose value ranged from $24,192 to $269,367. Also, an estimated 69 (96 percent) of the estimated 72 purchase orders for commissioned papers were noncompetitively awarded for amounts not to exceed $5,000 each.

In our opinion, the sole-source awards were not properly justified for four of the six contracts, those for (1) conducting a meeting on mathematics education, (2) providing technical assistance in education finance to state legislatures, (3) taking inventory of NIE's education research library, and (4) studying the cost consequences of declining elementary and secondary school enrollments. Also, we believe that the purchase orders awarded on a sole-source basis for the estimated 69 commissioned papers did not comply with the intent of procurement regulations.

The details of the awards for the four contracts and the commissioned paper purchase orders follow, as well as a discussion of recent legislative and regulatory changes affecting noncompetitive procurements.

Contract to Conduct Meeting on Mathematics Education

On September 30, 1983, NIE awarded a sole-source contract for $24,192 to the National Council of Teachers of Mathematics to (1) plan a meeting on mathematics education, (2) conduct the meeting, and (3) disseminate the meeting results to interested persons.

The justification for noncompetitive procurement cited uniqueness and urgency as the two reasons for awarding this contract on a sole-source basis. While many organizations were capable of conducting this meeting, the justification noted, the National Council of Teachers of Mathematics was unique in its ability to involve a broad range of mathematicians in planning it and disseminating meeting results to the mathematics education community. That community included elementary and secondary mathematics teachers, publishers of mathematics textbooks, and researchers in mathematics education. In its justification, the procuring office noted that seven other mathematics organizations and an unspecified number of smaller professional groups were considered as potential competitors for the contract. It unilaterally decided that they could not effectively plan the meeting and disseminate meeting results. The contract file did not, however, contain evidence that any other organizations were contacted, and the contracting officer told us that no other sources were contacted.

Noncompetitive contract awards may be justified, according to federal regulations in effect at the time of this award (41 C.F.R. 1-3.107(a)(4)), when there is only one source that, because of unique capabilities, can meet the government's minimum requirements. But we do not believe that the requirements of this contract (conducting a meeting and disseminating its results) were so unique or complex that only one potential

contractor could perform the work to the exclusion of all other firms. NIE here made no attempt at competition. While the rapid communication capability of the National Council of Teachers of Mathematics might have made it ultimately the most advantageous offeror, other potential contractors should have been solicited.

The contract justification also asserted that a sole-source award of this contract was justified on the basis of urgency, because the participation of two specified individuals was virtually essential for a successful meeting, and prior commitments limited the times they were available to attend. Thus, planning had to start quickly if their participation was to be secured. The National Council of Teachers of Mathematics was the only organization with necessary staff and resources to proceed quickly with planning the meeting, the justification said. However, the contract file did not indicate that any other sources were contacted, nor did it contain any other evidence to support this statement.

When there is a serious emergency that does not permit an agency the time to obtain competition, and only one known source can meet the government's needs within the required time, federal regulations allowed a noncompetitive contract to be awarded on the basis of urgency. However, the regulations also required competition to the maximum practicable extent within the time available.

The contract was awarded on September 30, 1983, but the meeting was not held until early December 1983. We believe that at least a limited competition could have been held and other potential contractors could have been solicited. A determination that competition was not feasible should have been based on a test of the marketplace. The marketplace can be tested formally or informally, ranging from written or telephone contacts with knowledgeable federal or nonfederal experts regarding similar or duplicate requirements and the results of any market test recently undertaken, to announcements in pertinent publications. The extent of the test would depend on what was reasonable in the circumstances.

According to the NIE contracting officer for this contract, competition was feasible but not practical. Had the contract not been awarded by the end of fiscal year 1983, available funds would have lapsed, and the contract could not have been funded with fiscal year 1983 funds.

The initial justification for noncompetitive procurement was dated August 23, 1983, according to the contract file. We believe that the

requirements of this procurement, from its inception, were not sufficiently unique to warrant a sole-source procurement. Federal procurement regulations do not identify loss of funds as a circumstance that justifies a noncompetitive procurement. Also, the Comptroller General has taken the position that the possible loss of funds at the end of a fiscal year does not justify the award of a sole-source contract.[12]

Contract for Technical Assistance to State Legislatures

On June 1, 1983, NIE renewed on a noncompetitive basis a contract with the National Conference of State Legislatures to provide technical assistance in education finance to state legislatures. Work under the contract, valued at $269,367, included making competitive grant awards to states for legislative policy studies, providing individual technical assistance, conducting legislative conferences, and writing various publications. NIE's original contract with this organization began in April 1975.

The June 1983 renewal was based on a 2-year sole-source justification approved in February 1982. It authorized award of two 1-year contracts to this organization for fiscal years 1982 and 1983. As a basis for the sole-source awards, the justification cited an NIE directive providing for sole-source awards when

"Services must be obtained from a certain State, Interstate or local government unit or from a non-profit organization comprised of representatives of such governmental units or their officers, which organization or units are unique bodies without like or equal in being able to meet the requirement."

However, the contract file did not show that the contractor was the only source capable of doing this work. The individual who was Acting Chief of NIE's Contracts and Grants Management Division at the time of this procurement told us that no other source was considered for this contract award, even though he believed that the National Conference of State Legislatures was not unique in meeting NIE's minimum requirement. But the NIE Noncompetitive Procurement Review Board approved the justification, he explained, and his division lacked the authority to overrule the board.

To the extent that the NIE directive provides that a sole-source contract is valid where only one source can perform the contract work, it is an accurate statement of governing law. To the extent that the directive implies or to the extent that NIE officials rely on this directive as giving

[12]See Quest Electronics, B-193641, March 27, 1979, 79-1 CPD 205.

them additional discretion in the award of sole-source contracts to state or quasigovernment entities, it is void. We are not aware of any decision, rule, regulation, or law giving agencies enhanced sole-source authority in dealing with state bodies where additional sources potentially exist in the commercial marketplace.

The National Conference of State Legislatures may or may not have been the best contractor to perform this work, but we believe that the sole-source award was not justified. Neither the Acting Chief nor the contract file supported the contention that this contractor was the only source capable of doing this work.

Contract for Library Inventory

On September 26, 1983, NIE awarded a noncompetitive contract to ProLibra Associates, Inc., for $96,500 to inventory NIE's education research library. The purpose of taking the inventory was to provide an accurate numerical count of the library holdings and to identify missing items and multiple copies.

NIE originally proposed to award this contract to a firm under section 8(a) of the Small Business Act. But, as this was a service contract, funds had to be committed and work completed by the last day of the fiscal year, according to the individual who was both Acting Chief of NIE's Contracts and Grants Management Division and the contracting officer at the time of this procurement. After the proposed firm advised NIE in a September 19, 1983, letter of the amount of time it needed to complete the contract work, NIE concluded that the required time was not available before the end of the fiscal year.

There was not enough time to obtain the services of another 8(a) firm before expiration of fiscal year 1983, the contracting officer said. The justification, dated September 26, 1983, for the sole-source contract stated that NIE had preliminarily contacted three potential contractors and decided that only ProLibra could perform the required work by the end of fiscal year 1983. Since available funds could not be carried over to the next fiscal year, the justification also said, all work had to be completed by the end of the fiscal year. But possible loss of funds at the end of a fiscal year does not justify the award of a sole-source contract, as we previously discussed.

When the contracting officer decided to award the contract, he told us, he was advised that the building in which the library was located was being torn down and the library had to be relocated. To minimize the

time the library would be closed, it was necessary to simultaneously inventory and pack the books prior to the building's demolition. On this basis, he believed that an urgent condition existed justifying the award of a noncompetitive contract. The contract file, however, contained no documentation to support assertions concerning the need to coordinate the library inventory and building demolition.

Actually, the library relocation occurred between June and July of 1983—well before the contract was awarded—the Acting Assistant Director, Information Resources Division, and the head librarian advised us. The library opened in its new location on August 8, 1983, the head librarian said, and the inventory was taken after the relocation.

In making his decision, the contracting officer stated, he relied on program officials' statements, but had he known that the library was already moved, he would not have approved the sole-source justification on the basis of urgency. Once the move occurred, he said, the urgency connected with this procurement no longer existed.

Contract to Study Cost Consequences of Declining School Enrollments

On December 2, 1980, NIE issued an RFP for a study of the cost consequences of declining enrollments in elementary and secondary schools. Of 13 responses received, 6 were in the competitive range, including that of Mathematica Policy Research, Inc. Upon reviewing the six offerors' responses to initial technical and cost questions, the project review board wanted to eliminate four offerors from the competitive range, leaving Mathematica and another firm. On December 4, 1981, however, before further action was taken, budget constraints caused the solicitation to be canceled.

Two months later, on February 4, 1982, Mathematica submitted, as an unsolicited proposal, a scaled-down version of the same proposal it had submitted under the competitive procurement. (A written offer to do a proposed task under contract, an unsolicited proposal is initiated by a prospective contractor and submitted to the government without government solicitation.) Based on the unsolicited proposal, NIE awarded a sole-source contract for $80,091 to Mathematica on January 4, 1983.

Federal procurement regulations, 41 C.F.R. 1-4.910 (1982), provide in part as follows:

"(a) A favorable comprehensive evaluation of an unsolicited proposal is not, in itself, sufficient justification for negotiating on a noncompetitive

basis with the offeror. When a document qualifies as an unsolicited proposal . . . but the substance: (1) Is available to the Government without restriction from another source, or (2) closely resembles that of a pending competitive solicitation, or (3) is otherwise not sufficiently unqiue [sic] to justify acceptance . . ., the unsolicited proposal shall not be acceptable . . .

(b) A negotiated, noncompetitive procurement is permissible when an unsolicited proposal has received a favorable technical evaluation, unless it is determined that the substance thereof is available to the Government without restriction from another source . . ."

This regulation reiterates the general rule that sole-source procurements are justified if the government's requirements can be met from only one source.

NIE's justification for this award on a sole-source basis was that there was no pending competitive solicitation, thus the proposal was properly evaluated as an unsolicited proposal. In our opinion, NIE's reliance on this asserted justification is inappropriate. Nothing in NIE's contract file suggests that this study was not available to the government from another source without restriction. To the contrary, the results of NIE's previous competitive solicitation refutes any such claim. That a competitive procurement for the same item is not currently pending does not, we believe, justify a sole-source procurement where the agency is able to issue a competitive solicitation for the same requirement.

Purchase Orders for Commissioned Papers

Of an estimated 72 purchase orders awarded by NIE for procurement of commissioned papers in fiscal year 1983, we estimate that 69 (96 percent) were made noncompetitively, based on our review of a random sample. This was contrary to the intent of procurement regulations.

For small purchases (under $10,000), federal procurement regulations (41 C.F.R. 1-3.603-1(a)(1)) provided that "Reasonable competition shall be obtained in making small purchases in excess of $500." The Comptroller General also has expressed the opinion that a reasonable effort must be made to secure competition.[13] Department of Education regulations stated that three generally was considered a reasonable number of sources to be solicited for purchases over $500 but less than $5,000; for purchases of $5,000 to $10,000, three was the minimum.

[13]See R.E. White & Associates, B-206489, April 1, 1982, 82-1 CPD 294.

NIE covers the award of purchase orders for commissioned papers in a directive dated March 3, 1982, that states:

"A. Program officials are authorized to request the Contracts and Grants Management Division . . . to issue a purchase order for a commissioned paper on a sole source basis provided the following requirements have been met:

"1. The program official reviews the field of qualified authors and can demonstrate that the individual selected is considered an expert in the field and is available to produce the desired product in the time required. The program office must not solicit preparation of the paper or authorize initiation of such a paper.

"2. The program official estimates that the cost of the commissioned paper does not exceed $5,000 (on an average such papers should not exceed $2,500 in any program group) . . ."

Under this directive, it appears to us that NIE, after reviewing qualified authors, may choose one with or without considering or contacting other potential authors. If no other authors are identified and contacted, this practice results in sole-source awards for commissioned papers. Since there is no applicable exception to the federal requirement to secure reasonable competition, this practice is technically improper.

We reviewed files of a sample of 23 purchase orders awarded by NIE in fiscal year 1983 for commissioned papers and discussed them with an NIE contracting officer to determine whether there was any evidence that NIE contacted more than one source before making the awards. Although NIE had unilaterally considered other sources, we found only one file containing evidence that more than one source was actually contacted. As the results of our sample were projectable to the universe, we estimate that 96 percent of NIE's purchase orders for commissioned papers were noncompetitively awarded. We also discussed the procedure for awarding commissioned papers with the Chief of NIE's Contracts and Grants Management Division, who told us that three potential authors should be contacted to determine their availability to prepare the paper. According to the Chief, the name of each individual contacted for possible selection should be included in the file. The contracting officer told us that, because the commissioned papers were awarded in a hurried manner, "some things slipped by."

We realize that NIE faces some practical problems in obtaining competition for commissioned papers. Small purchases are negotiated procurements; in making the awards to purchase commissioned papers, NIE considered other factors besides price. Written solicitations are not required, and any competition based on detailed technical criteria may not be feasible.

Nevertheless, we believe that, before awarding these purchase orders, at a minimum NIE should attempt to contact three qualified experts and inquire as to their interest, availability, experience, expertise, special qualifications, and similar factors relevant to the subject matter. In this way, NIE could comply with the intent of procurement regulations regarding reasonable competition. The Acting Chief of NIE's Contracts and Grants Management Division at the time the purchase orders were awarded, who wrote the directive, advised us that such contacts were intended under the March 1982 directive.

In its oral comments on a draft of this report, the Department told us that it may not always be practical to attempt to contact three qualified experts before awarding a purchase order for a commissioned paper. The agency has agreed, however, to review its procedure for making these awards to assure that it is in compliance with legislative and regulatory changes that have occurred since the period covered by our review.

Legislative and Regulatory Changes Affecting Noncompetitive Procurements

Changes in federal law and regulations and potentially in NIE guidelines after the period of our review should have an impact on NIE's noncompetitive procurements in the future. The Competition in Contracting Act of 1984 (98 Stat. 1175) approved July 18, 1984, added, among other things, a section on competition requirements to section 303 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253). This change requires executive agencies to obtain full and open competition for procurements based on solicitations issued after March 31, 1985, except in certain circumstances, such as when

- the property or services are available from only one source and no other type of property or services will satisfy the agency's needs,
- the agency's need is of such an unusual and compelling urgency that the government would be seriously injured unless the agency is allowed to limit the number of sources from which it solicits bids or proposals,
- a statute expressly authorizes or requires that the procurement be made through another agency or from a specified source, or

- national security would be compromised unless the number of sources to which the agency's needs are disclosed is limited.

If other than competitive procedures are used, the contracting officer must prepare a written justification which, depending on the amount of the contract, must be approved by specified agency officials, including the advocate for competition for the procuring activity. Each executive agency head must, according to the Competition in Contracting Act, designate an individual to serve as an advocate for competition. This advocate is responsible for challenging barriers to, and promoting, full and open competition in the agency's procurement activities. (Federal regulations were amended effective April 1, 1985, to incorporate the act's competition provisions.)

Also, NIE has drafted an Acquisition Policies and Procedures Handbook, which establishes uniform policies and procedures for NIE procurements. It describes criteria for determining whether procurements may be made noncompetitively, required justification documents, and requirements for publicizing noncompetitive procurements. Before issuance, it will be revised to incorporate the act's requirements, the NIE official responsible for preparing it said. As of November 12, 1985, an estimated issuance date for the handbook had not been established, according to the Chief, Contracts and Grants Management Division. When issued, the handbook should help NIE to better comply with the Competition in Contracting Act's provisions regarding noncompetitive procurements.

Therefore, at this time we are making no recommendations concerning such procurements to the Secretary of Education.

Contracts Awarded at Year-End

That agencies should allow sufficient time to prepare solicitations, evaluate bids or proposals, negotiate, and make contract awards in an orderly manner is stated in an Office of Management and Budget policy letter dated August 13, 1981. During fiscal year 1983, NIE awarded 52 new contracts and obligated about $22.5 million for them. One contract was excluded from the scope of our review because it was being protested by an unsuccessful offeror when our work began. Obligations for the remaining 51 contracts totaled about $21.8 million. We reviewed 39 of these contracts amounting to about $19.3 million. Of the 39 contracts, 21 totaling about $1.5 million, were awarded in the last week of the fiscal year. Projecting this finding to the universe, we estimated that 26 (51 percent) of the fiscal year 1983 contracts were awarded in the last week of the fiscal year. Of these year-end contracts, 11 were awarded

hastily, and some deliberative, orderly contracting processes were eliminated or performed in a perfunctory manner so that NIE could award the contracts on or before September 30, 1983.

Awards for the 11 contracts were made without adequate, or in some cases, any negotiations. One was awarded on September 30, before two of the contract's provisions were agreed upon by NIE and the contractor. Given the contract, the offeror changed the contract provisions and signed and returned it to NIE. Without further discussion with the offeror, NIE reinstated the two original contract provisions and signed it on September 30.

On October 3, NIE advised the contractor of the change and its intention to cancel the contract if the change was not acceptable. On October 27, the contractor responded that several contract provisions were irrelevant to the purpose of the contract and "oft-times inconsistent, no doubt affected by the hasty actions usually associated with the end of the fiscal year." Accordingly, the contractor requested certain modifications to the contract that it hoped would now be acceptable as they "were difficult to convey . . . properly considering the rush that occurred during the final days of the fiscal year." NIE rejected the proposed modifications and on November 8, advised the contractor that the contract would be terminated if its terms were not acceptable. According to the individual who was Acting Chief of NIE's Contracts and Grants Management Division at the time of this procurement, the contractor did not respond to NIE's November 8 letter. NIE interpreted this as implied acceptance of the contract terms, and the contract was continued.

Another of the 11 contracts was awarded without adequate negotiations or designation of a project director. In this case, the contractor's cost proposal was received at 4:00 p.m. on September 30. The same day, NIE conducted oral negotiations with the contractor, some changes in the budget were agreed to, and the contract was signed. Neither the review of the offeror's cost proposal nor the conduct of negotiations were adequate, according to the individual who was both Acting Chief of the Contracts and Grants Management Division and contracting officer at the time this contract was awarded. He believed the contract should not have been awarded. Had it not been signed on September 30, however, fiscal year 1983 funding authority would have lapsed, he said, and the funds would not have been available for obligation.

One factor in evaluation of this contractor's proposal concerned the qualifications, experience, and training of the principal staff, including

the project director. During negotiations held on the last day of the fiscal year, however, the contracting officer, noting that the contractor's proposed project director was a former NIE employee, requested that the individual not be used as project director. The contractor agreed to appoint a new project director within a month, but the contract was awarded on September 30 without NIE knowing who the project director would be.

The remaining nine contracts we found to be hastily awarded were for planning the new educational laboratory that we discussed earlier (see p. 19). These contracts were awarded on September 29 and 30 without negotiations because there was insufficient time to conduct negotiations and still award the contracts by September 30. As noted earlier, five of the contracts were awarded to offerors whose proposals contained limitations which, according to the project review board, could have affected the successful outcome of the project. The awards were made, however, because NIE believed that, had time allowed for negotiation, all offerors would have had the opportunity to clarify their proposals.

Employment Relationships Between Education Employees and NIE Contractors

From files for the 39 contracts and 23 purchase orders in our sample, we identified 175 Department of Education employees involved in the award and administration of these procurements. In addition, we reviewed Education personnel data to determine whether any of the employees had been employed by the specific contractor with which they were involved as Education employees, either before or after the procurement award. For 130 of these employees, our review of employment histories obtained from Education revealed no instance in which an employee had during a 5-year period preceding the procurement award been employed by the specific contractor. (For 45 employees, employment histories were not available.) For former employees, Education maintained postemployment information only for those who retired or left to work for another government agency. Thus, we could not determine the employment status of employees who left to work in the private sector.

However, we noted in our review of the contract files one instance in which an Education employee who had been involved in the development of an RFP accepted a job as project director with the contractor that received an award under the solicitation. But the Department of Education's ethics counselor, after investigating the propriety of the matter, determined on December 12, 1983, that no applicable federal

laws or regulations had been violated. The details of the case are as follows:

The employee, who participated in developing an RFP issued July 15, 1983, for a competitive contract, also had been appointed to serve on NIE's review board to evaluate offerors' proposals for the contract. On about July 22, the NIE employee was approached by a consortium of research organizations and asked to consider becoming director of a proposed project being developed in response to the July 15 RFP. The NIE employee immediately notified his supervisor that he had accepted the position of project director contingent upon (1) the consortium receiving the contract award and (2) NIE approval of his designation as project director. He also advised the NIE Director and Deputy Director of the consortium's offer and his contingent acceptance.

The NIE employee conferred with the Department's ethics counselor, who advised him that, if the award was made to the consortium, it would be permissible for him to become the project director. Based on the ethics counselor's advice, he declined to serve on the project review board to evaluate offerors' proposals for this contract. (The employee notified his supervisor of these matters in an August 2 memorandum.) The ethics counselor determined that the Ethics in Government Act was not violated in this case because, when the NIE employee worked on the RFP, no potential offerors were identified, and the offer of employment was made after the RFP was issued.

The consortium and two other organizations submitted responses to the RFP. Submitted to NIE on August 18, the consortium's proposal included the name and resume of a proposed project director other than that of the NIE employee to whom the consortium had offered the position. The proposal also stated that the consortium would conduct a job search prior to making a final selection of a project director.

The board recommended that the contract be awarded to the consortium, and NIE did so on September 30. Article IX of the contract provided that NIE's contracting officer reserved the right to approve the designation of any person, other than the one identified in the proposal, as project director. In a November 7 letter, the consortium advised NIE of its selection of the NIE employee as project director and requested NIE's approval of the selection.

Concurring with the contractor's project director selection, the NIE project officer so notified the Acting Chief of NIE's Contracts and Grants

Management Division in a November 9 memorandum. The Acting Chief, however, concerned that NIE was not adequately involved in the project director selection and that the selection gave the appearance of a possible conflict of interest, refused the consortium's request.

Because of this, his immediate supervisor, the Acting Associate Director of NIE's Office of Administration, Management and Budget, assumed the contracting officer's responsibilities. After consultation with the Department's Office of General Counsel, he approved the contractor's selection of the former NIE employee as project director. He based the approval on his determination that, while the contract gave NIE authority to approve the selection of the project director, it did not require the consortium to involve NIE in its selection process. Nevertheless, the Acting Associate Director believed, the consortium displayed a good faith effort to involve NIE in the process, and there was no evidence that conflict of interest or ethics regulations had been violated.